

Research on the Predicament and Countermeasures of the Shutdown of the WTO Appellate Body

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Abstract

As an authoritative and universal way of global governance, the WTO dispute settlement mechanism plays an important role in resolving international disputes and promoting governance cooperation among countries. However, in recent years, the United States has obstructed the selection of judges of the Appellate Body, and the Appellate Body in the WTO Dispute Settlement Mechanism is facing Legitimacy and functional crisis. Even on December 11, 2019, there was a crisis of the shutdown of the Appellate Body of the World Trade Organization due to the insufficient number of judges in the Appellate Body. At present, it is difficult for the Appellate Body to maintain its normal operation, and the reform of the WTO system cannot be delayed. The purpose of this paper is to analyze the dilemma of the Appellate Body in the WTO dispute settlement mechanism, to find out the existing problems in the mechanism, and to put forward relevant reform suggestions.

Keywords

World Trade Organization; Dispute Settlement; Appellate Body.

1. Introduction

The WTO has always played an important role in promoting trade liberalization, economic globalization and sustainable development of the world economy. The basic function of the WTO is to provide a reasonable conflict resolution method for trade disputes between countries, and the Appellate Body under the WTO dispute settlement mechanism has almost played the role of the highest judicial body in international trade. Its mechanism of action is to correct the wrong decision of the panel, so as to make the final decision on the appeal case. However, because the United States obstructed the selection of judges of the WTO Appellate Body, the number of judges of the WTO Appellate Body could not be filled. In September 2018, there were only 3 judges of the WTO Appellate Body, which greatly reduced the actual operation efficiency of the WTO and the legitimacy of the body. gone. In response to the countercurrent of unilateralism set off by the United States, various countries have also actively put forward suggestions aimed at maintaining the multilateral trading system established by the WTO and preventing world trade from being controlled by powers.

2. The Current Status of the WTO Appellate Body

Compared with dispute settlement methods in other fields of international law, the WTO dispute settlement mechanism is characterized by a high degree of legalization, streamlined and timely procedures, and a high degree of compliance with the obligations of agreements. The judicial characteristics of DSB make members tend to submit disputes related to WTO agreements to DSB for settlement, which is one of the reasons why the current DSB is overburdened. However, unlike from 1996 to 2013, where the panel report appeal rate fluctuated sharply between 27% and 100%, the panel report appeal rate has stabilized at 67% to 87% since 2014. In recent years, not only the appeal rate reported by the panel has remained

at a high level, but the number of issues appealed by the appellant, the number of precedents involved and the number of documents submitted have also been on the rise. Coupled with the development of time and changes in the world economic situation, the Appellate Body There is also a constant need for new interpretations of what is contained in WTO agreements, leading to an increasing complexity of WTO disputes. In addition, according to paragraph 1 of Article 17 of the DSU, "the number of members of the Appellate Body shall be seven. The members are part-timers for the work of the Appellate Body, and most of them still have their own work to do. Facing the increasing number and the complexity of the case It is undoubtedly a daunting task for the members of the Appellate Body to complete the appeal report within the 90-day trial period stipulated by the DSU.

According to data from the WTO's official website, as of January 1, 2019, the panel's report appeal rate was 67%, and the appeal conclusion rate was 79%. There were 12 panel reports that were appealed in 2018, of which 6 cases are still at the appeal stage. As of February 28, 2020, there were 8 cases in the trial stage of the Appellate Body, and all of them have exceeded the 90-day trial limit. The current appeal rate has far exceeded the expectations of the designers of the appeal mechanism. In addition, the number and complexity of cases, the part-time status of members of the Appellate Body, and the limitation of trial time stipulated by the DSU have led to the overloaded status of the Appellate Body.

3. The WTO Appellate Body Faces Dilemma

It is undeniable that the Appellate Body currently has many flaws and problems, which are also scorned by the United States and used to attack the WTO, which eventually led to the shutdown of the WTO Appellate Body. While many EU members have come up with solutions to the dilemma, the US remains on deaf ears. The procedural issues in the suspension of the Appellate Body mainly include the following aspects:

3.1. Handling of Outstanding Cases by Outgoing Judges

In the Sino-US subsidy war in August 2019, the DSB chairman announced the adoption of the expert group report. Among them, 11 countervailing measures implemented by the United States violated WTO rules. The United States made a speech on this, saying: The term of Swanson, the appellate body judge in charge of one of the cases, has ended before, but he still handles the case after he takes office, and his ruling is inconsistent with the regulations. . The fact that members who have left the Appellate Body are still working on cases that remain open is indeed one of the places where the Appellate Body has been blamed by member states. Because of this issue, the DSB has no choice but to take such an approach: Since 2016, the United States has begun to attack the Appellate Body, initially preventing South Korean judge Zhang Shenghe and former US trade official Jennifer Hillman from being re-elected. After preventing the members of the Appellate Body from being re-elected, the United States has tasted the sweetness. Since then, it has repeatedly rejected the approval of the list of members of the Appellate Body. Therefore, the members of the Appellate Body have long been in a state of dissatisfaction with the maximum number of 7 members. As each case requires at least three judges to deal with, the lack of members of the Appellate Body makes the task of each judge very difficult, and each judge's term of office is only four years. pending cases. Therefore, the reason why DSB adopts this approach is that it is not easy to hand over pending cases to other judges due to the insufficient number of judges in the Appellate Body; secondly, even if the case is handed over to other judges, the new judges will Having been exposed to this case, he is often unaware of the circumstances of the pending case, and is more prone to problems when making a final decision. With regard to this shortcoming of the Appellate Body, member states proposed in their documents on WTO reform that corresponding legal rules should be developed for outgoing Appellate Body members to allow them to complete pending appeals. In this way, clear

legal support can be provided for judges who are about to reach their term of office to continue to deal with cases pending.

3.2. The Issue of Trial Limits

In addition to slamming the issue of outgoing members of the Appellate Body still handling outstanding cases, the U.S. published a report that pointed to another problem: The Appellate Body reported that the 90-day deadline for issuing a ruling had passed.

Pursuant to Article 17(5) of the DSU, the proceedings shall normally not exceed 60 days from the date of notification of the disputing party's decision to appeal to the date of the distribution of its report by the Appellate Body. If the Appellate Body is unable to submit its report within the prescribed time limit, it shall notify the DSB in writing of the reasons for the delay and the expected deadline for submitting the report. The proceedings shall not exceed 90 days. The Appellate Body does have this problem. In the first few years of its establishment, it was basically guaranteed to issue a final report within the 90-day trial period. Issue a judgment report within the trial period. One of the reasons for this situation is the serious shortage of members of the Appellate Body. Since 2016, there are only 3 members left, and the number of cases is quite large. The pressure on judges is very high. Secondly, the trade disputes between countries are very difficult. Complicated, it involves different legal systems and policies of various countries, and even different cultural customs. Compared with the early days of the Appellate Body, the number of appeals and the complexity of the cases have continued unabated. From 1995 to 2017, the WTO Dispute Settlement Mechanism accepted 535 dispute cases, an average of 23 cases per year, of which 156 cases entered the appeal process. The DSB distributes more than 400 panel reports, Appellate Body reports and arbitral decisions or decisions. In total, the DSB held more than 400 meetings. In 2018, with Trump's voice of "America First" rising, the number of unilateral trade measures initiated by the United States surged, and the WTO's litigation pressure suddenly increased. In this case, if you want to ensure a high-quality conclusion of the case, 90 days is somewhat impractical. Therefore, in the Joint Proposal of China, Europe, India, etc., all parties suggested to amend Article 17, paragraph 5 of the DSU, analyze the specific situation in detail, and strengthen the consultation and communication between the disputing parties. For different cases, the case can be extended for the longest time. During the processing period, ensure the fair and high-quality conclusion of the case.

3.3. Issues Concerning the Jurisdiction of the Appellate Body

The Trump administration has repeatedly criticized the Appellate Body for "exercising its powers conferred by the dispute settlement mechanism beyond its authority" and harming the legitimate interests of the United States. Article 17, paragraph 6 of the DSU clearly states: "The appeal shall be limited to the legal issues covered by the panel's report and the interpretation of the law made by the panel." This is made to reduce the burden on the Appellate Body, and this provision is also conducive to achieving uniformity Legal interpretation. It is true that in practice, for some specific cases, the distinction between the factual issues and the legal issues is not obvious, which leads to the fact that sometimes the legal issues identified by the Appellate Body may be the objective facts identified by the member states. If circumstances that are "objective facts" are found to be a matter of law, the Appellate Body will include those facts in the scope of the appeal review. Examples include the EC Hormones case and the American Shrimp and Turtle case. This has led to the perception that the Appellate Body is sometimes considered too broad by disputing parties. In fact, regardless of the purpose of this provision, on the premise of ensuring fairness in fact and law, it is the meaning of the existence of the Appellate Body to arrive at a fair ruling. Therefore, from this point of view, if only reviewing pure Legal issues and important factual issues are avoided, which may lead to biased decisions, and the existence of the Appellate Body will become meaningless. In response to the U.S. appeal,

member states proposed that the Appellate Body could interpret paragraph 6 of Article 17 of the DSU in a broader context and make corresponding provisions. For example, in order to ensure the fairness of the final trial results, some factual issues could be included in the Appellate Body within the scope of review.

It is true that even though member states have put forward new reform opinions on the shortcomings of the Appellate Body and the demands of the United States, and have strongly expressed their desire to continue the operation of the WTO Appellate Body, the United States remains unmoved, which eventually led to the closure of the Appellate Body. . The reason why the United States has been dissatisfied with the Appellate Body, in addition to the above-mentioned theoretical shortcomings of the Appellate Body itself, is also because it has long been skeptical of the WTO Appellate Mechanism. As early as more than two decades ago, the US Congress held a heated debate on the establishment of DSB. One of the outcomes of the Uruguay Round negotiations, the Understanding on Dispute Settlement Rules and Procedures (DSU), was passed in Congress only after President Clinton's repeated direct intervention. The enforceability of the DSU's rulings, which at times has forced the United States to change its decisions, is one of the main reasons why it dislikes the Appellate Body. Not only that, after U.S. President Trump took office, the U.S. trade policy began to pursue the "America First" doctrine and appeared extreme unilateral trade protection trends, which eventually led to the U.S. attacking the Appellate Body. In addition to President Trump's dissatisfaction with the Appellate Body, Robert Lighthizer, the U.S. Trade Representative responsible for interfacing with the WTO, also deeply hates the Appellate Body. This also shows that the real purpose of Robert himself and the Appellate Body is to hope that the world trade environment will return to the GATT era.

4. Establishment of a New Appellate Body and My Country's Countermeasures

4.1. The Idea of Establishing a New Appellate Body

Due to the deadlock in the selection process of the Appellate Body members, it is obviously not easy to make the existing Appellate Body operate again. Therefore, the author suggests that a new parallel Appellate Body can be established within the framework of the original Appellate Body as a temporary replacement, inheriting the functions of the original Appellate Body, guarantees the normal operation of the DSB. In terms of member selection, the new Appellate Body no longer requires all members to join, but is freely selected by WTO members. After the establishment of the new Appellate Body, seven new Appellate Body judges are jointly elected by subsequent members. In the face of dispute settlement, if both parties to the dispute are member states that have agreed to establish a new Appellate Body, the dispute between them can be referred to the new Appellate Body for final adjudication. Of course, if one or both parties to the dispute belong to member states that do not agree to the establishment of a new Appellate Body, they can resort to other means to resolve the dispute. The scope and matters of the new Appellate Body are the same as those of the original Appellate Body, and they deal with the legal issues in the panel report.

Even if a new Appellate Body is built, it does not mean that the original Appellate Body will be abandoned forever. No one can predict the direction of the Appellate Body in the future: if US President Trump cannot be re-elected, and the next US President changes his trade policy, no longer attacks the Appellate Body, and prevents the appointment of members of the Appellate Body, the Appellate Body's predicament will be solved. At that time, how to face the two Appellate Body? In fact, there is not much room for worry about this issue. As mentioned above, the United States has a long history of grievances with the Appellate Body, and paralyzing the Appellate Body has always been its wish. Therefore, the chances of the Appellate Body going

back up and running are very slim. Even if the U.S. changes its trade strategy and the original Appellate Body is reactivated, it can be artificially suspended after the new Appellate Body has processed its existing cases. After all, the original Appellate Body is more representative and multilateral. The new Appellate Body was created for a very simple purpose: to preserve the old appellate system, not to replace the old one. Regarding the relationship between the old and the new Appellate Body and how to deal with the new Appellate Body once the old Appellate Body resumes operation, it can be stipulated in advance in the agreement of the parties for the establishment of the new Appellate Body.

4.2. Feasibility Assessment of Establishing a New Appellate Body

In what way can the establishment of the new Appellate Body be fully rational and legitimate? This paper puts forward the following points:

The first is to amend the text of the DSU to stipulate that in some cases, for example, when the existing Appellate Body ceases to function and cannot hear appeal cases, some members can be allowed to establish a new Appellate Body by signing a new multilateral agreement. The author believes that the feasibility of this method is not high. The reasons are as follows: First, the DSU is applicable to all WTO members. If the DSU is to be revised and a new appellate body is established, it will inevitably be strongly opposed and obstructed by the United States, one of the WTO members. Secondly, in practice, this method is even more impossible to achieve. This is because, as Annex II of the WTO Agreement, the revision of the DSU needs to be negotiated and approved by all WTO members, which is again caught in a vicious circle. As a member It is impossible for the United States, one of the countries, to agree to the establishment of a new appellate body by other member states, because its purpose is to completely destroy the appellate body and the appellate system.

The second method is to sign a plurilateral agreement within the framework of the WTO, and the content of the agreement is to establish a new Appellate Body. The WTO plurilateral agreement was established under Article 2(3) of the WTO Agreement. The article states: "The plurilateral trade agreements contained in Annex 4 apply only to, and are binding on, the members that have accepted them." In other words, to sign a plurilateral agreement that is in force only for some members, it is necessary to Signed under WTO Annex 4. The feasibility of this method is not high. The problem still lies in the WTO Agreement and the principle of consensus adoption. Article 10, paragraph 9 of the WTO Agreement stipulates that plurilateral agreements under Annex 4 can only be signed through negotiation. The principle of consistency arises. This goes back to the vicious circle described above. Even if the new plurilateral agreement does not take effect for the United States, but only for the members willing to accept the Appellate Body and the Appellate System, considering the ultimate purpose of the United States and its attitude towards the Appellate Body, the possibility of agreeing to a plurilateral agreement is unlikely. big.

The third method is more novel, that is, outside the WTO framework, countries sign international treaties or agreements to establish a new Appellate Body. This approach avoids linking the agreement on the establishment of a new Appellate Body with the negotiation-by-consultation principle of WTO members, so that the agreement is no longer subject to the principle of consensus-based adoption and the WTO Agreement. The new agreement is not within the framework of the WTO, so the opinion of the United States is no longer required, only the opinions of countries or organizations interested in establishing a new Appellate Body need to be considered.

4.3. Suggestions for My Country to Promote the Establishment of a New Appellate Body

my country can contact and appeal to interested parties to negotiate and reach an agreement on the establishment of a new Appellate Body. The agreement is not a plurilateral agreement within the framework of the WTO, but only an international treaty between countries. The new Appellate Body can refer to the old Appellate Body mechanism in terms of the content of the ruling and the way of adjudication. In addition, the following issues should be paid attention to:

4.3.1. Selection and Appointment of New Appellate Body Members

As far as the quick selection process is concerned, the same person should not serve on both Appellate Bodies at the same time, this is to ensure the impartiality of the referee. As far as appointments are concerned, since the United States is not a party to the international treaty or agreement, the approval of the list of candidates does not need to refer to the opinion of the United States. There is one more point that deserves special attention: the consensus principle that the U.S. directly utilizes. It should be vigilant that in the subsequent practice of trade dispute settlement, some other member states want to follow the example of the United States, intending to paralyze the new Appellate Body through consensus again. One of the possible ways is to require that the selection system of new members of the Appellate Body follow the principle of majority rule, rather than the principle of consensus, or to provide provisions in the negotiated agreement to establish a new Appellate Body that prevent the Appellate Body from shutting down due to such matters.

4.3.2. The Cost of the New Appellate Body

The following issues should be considered when negotiating the establishment of a new Appellate Body: 1. Who will bear the costs of the new Appellate Body. 2. Whether the new Appellate Body has the right to use the resources of the WTO.

4.3.3. The Validity of the Two Appellate Bodies' Reports

In WTO practice, the original body's 0 report can be used as a guide for subsequent cases. Therefore, the author suggests that the report of the old Appellate Body can be used as a guide for the new Appellate Body. Members of the new Appellate Body can refer to the previous rulings, try to maintain a consistent and unified interpretation path with the previous rulings, and avoid the WTO due to substantial departure from the WTO. The rules are explained by expansion.

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